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No. 03-1602

Supreme Court, U.S.
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In The
Supreme Court of the United States

ARTICHOKE JOE'S,
CALIFORNIA GRAND CASINO, ET AL.,

Petitioners,

v.

GALE A. NORTON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Indian Gaming Regulatory Act of 1988 ("IGRA") prohibit the State of California from amending its constitution to permit Indian tribes to conduct and operate forms of class III gaming on Indian lands, subject to the requirements of IGRA, to the exclusion of all others?

2. Does the Equal Protection Clause of the United States Constitution prohibit the State of California from amending its constitution to permit Indian tribes to conduct and operate forms of class III gaming on Indian lands, subject to the requirements of IGRA, to the exclusion of all others?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
ARGUMENT	10
A. This Case Presents No Issue of Great National Importance	11
B. The Alleged Circuit Split Is an Illusory Basis for an Exercise of This Court's Jurisdiction	13
C. Proposition 1A Does Not Violate IGRA	15
1. IGRA's Plain Language Does Not Prohibit Proposition 1A	16
2. All Sources of Interpretive Guidance Indicate that IGRA Does Not Prohibit Proposition 1A	18
D. Proposition 1A Does Not Violate Equal Protection Principles	19
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena,
5 U.S. 200 (1995) 19

Buckley v. Valeo,
424 U.S. 1 (1976) 20

Cabazon Band of Mission Indians v. Wilson,
37 F.3d 430 (9th Cir. 1994) 2

California v. Cabazon Band of Mission Indians,
480 U.S. 202 (1987) 1

Chemehuevi Indian Tribe v. Wilson,
987 F.Supp. 804 (N.D. Cal. 1997) 2

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 18

Cheyenne River Sioux Tribe v. South Dakota,
3 F.3d 273 (8th Cir. 1993) 5

Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green, 995 F.2d 179 (10th Cir. 1993) 13, 14, 15

Conn. Nat'l Bank v. Germain,
503 U.S. 249 (1992) 18

Flynt v. California Gambling Control Comm'n,
104 Cal.App.4th 1125 (2002) 2, 3, 4, 6, 15

Hotel Employees and Restaurant Employees Int'l Union v. Davis, 21 Cal. 4th 585 (Cal.1999) 2, 3, 6, 7, 8

In re Indian Gaming Related Cases,
331 F.3d 1094 (9th Cir. 2003) 2, 4, 7, 8

Mashantucket Pequot Tribe v. Connecticut,
737 F.Supp. 169 (D.Conn. 1990) 12

TABLE OF AUTHORITIES – Continued

Page

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985) 16, 19

Morton v. Mancari, 417 U.S. 535 (1974) 20

Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250 (9th Cir. 1994) 1, 4, 5

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 7, 11

Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1995) 1

U.S. v. E.C. Investments, Inc., 77 F.3d 327 (9th Cir. 1996) 2

U.S. v. Santa Ynez Band of Chumash Indians, 33 F.Supp.2d 862 (C.D. Cal. 1998) 2

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979) 20, 21, 22, 23

CONSTITUTIONAL PROVISIONS

California Constitution, Article IV, section 19, subdivision (e) 6

California Constitution, Article IV, section 19, subdivision (f) ("Proposition 1A") ..... *passim*

U.S. Const., Amend. V 19

U.S. Const., Amend. XIV 19, 20

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES, RULES AND REGULATIONS

15 U.S.C.

§ 1171 14

§ 1175 14

§ 1178 14

18 U.S.C.

§§ 1166-1168 ("Public Law 280") 1, 2

25 U.S.C.

§ 2701 ..... 2, 20

§ 2702 20

§ 2702(1) 3

§ 2702(2) 3

§ 2703(6) 3

§ 2703(7)(A)(i) 3

§ 2703(7)(A)(i), (ii) 3

§ 2703(7)(B) 3

§ 2703(8) 3

§ 2710 3

§ 2710(3)(B) 4

§ 2710(a)(1) 3

§ 2710(a)(2) 3

§ 2710(b)-(c) 3

§ 2710(d) 4

§ 2710(d)(1) 4

TABLE OF AUTHORITIES – Continued

Page

§ 2710(d)(1)(B) 5, 16, 17

§ 2710(d)(6) 14

§ 2710(d)(6)(A) 14

§ 2710(d)(6)(B) 14

§ 2710(d)(8)(B) 19

Federal Rules of Appellate Procedure

43(c)(2) 1

Federal Rules of Civil Procedure

Rule 56 9

65 Fed. Reg. 31,189 (May 16, 2000) 8

STATE STATUTES

Ariz. Rev. Stat.

§ 5,504, subd. (D) 12

Cal. Gov. Code

§ 98005 ("Proposition 5") 6

§§ 98000-98012 6

Cal.Penal Code

§ 330 4

§ 330a 4

§ 330b 4

Conn.Gen.Stat.Ann.

§ 12-568f 12

TABLE OF AUTHORITIES – Continued

Page

KS Const. Art. 15,
§§ 3a-3c 12
Minn. Stat.
§ 240.13(a) 12
§ 240.30 13
§ 349.12 13
§ 349.13 13
§ 349.17 13
§ 349.166 13
§ 349.172 13
§ 349.173 13
§ 609.761 13
N.D. Cent. Code
§ 53-06.1-10 12
N.M. Stat. Ann.
§ 60-2E-27 12
N.Y. Gen Mon.
§ 185 12
N.Y. Tax Law
§ 1617-a 12
Or. Rev. Stat.
§ 461.215 12

TABLE OF AUTHORITIES – Continued

Page

Wash. Rev. Code

§ 9.46.0269(2) 13

§ 9.46.0321 13

§ 9.46.0331 13

§ 9.46.0335 13

§ 9.46.0341 13

§ 9.46.0351 13

§ 9.46.291 13

§ 37.12.010 22

§ 67.16.060 13

Wis. Stat.

§ 562.05 13

§ 562.124 13

§ 563.11 13

§ 565.01 13

SECONDARY SOURCES

Indian Gaming Regulatory Act, Report of the Select Committee on Indian Affairs, S. Rep. No. 100-446, at 13 (1988) ("Select Committee Report") (*reprinted in* 1988 U.S.C.C.A.N. 3071) 21

Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gaming Industry*, 63 MD. L. REV. 217 12

TABLE OF AUTHORITIES – Continued

Page

Alan Meister, Ph.D., *Indian Gaming Industry Report* (Casino City Press, July 2004) 11

Kevin K. Washburn, *Recurring Problems in Indian Gaming* 1 WYO. L. REV. 427 (2001) 3

STATEMENT OF THE CASE

In March 2000, the People of California resolved years of discord between the State of California, which historically barred casino-style gaming in its constitution, and Indian tribes located within the State, which sought the right to conduct casino-style gaming on Indian lands, pursuant to federal law. Here, the Petitioners, a coalition of non-tribal gambling interests, seek to destroy the balance the State has struck between tribal and federal interests in the promotion of tribal economic development on the one hand, and the State's interest in protecting its citizens from the ill-effects of casino-style gaming on the other. Because this case has been correctly decided in the courts below, and because it is not a case that otherwise warrants this Court's review, the Respondents, Governor Arnold Schwarzenegger, Attorney General Bill Lockyer, and Director of the California Division of Gambling Control Bob Lytle[1], request that this petition be denied.

It is important that this case be understood within the context of Indian gaming as it has developed in California.[2] The year after this Court's decision in *California v.*

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[1] Bob Lytle is substituted for his predecessor, Harlan W. Goodson, as Director of the California Division of Gambling Control. Fed. R. App. Proc. 43(c)(2).

[2] Only the essential aspects of this history are recounted here. However, a more detailed recitation is available in a long series of cases, beginning with this Court's ruling in *California v. Cabazon*, 480 U.S. 202 (1987) (holding that the State of California could not regulate on-reservation high-stakes bingo operations under Public Law 280) *See also Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1994), *amended*, 99 F.3d 321 (9th Cir. 1996) (holding that in tribal-state gaming compact negotiations under IGRA, California had no obligation to negotiate over forms of class III gaming that are not permitted within the State); *Sycuan Band of Mission Indians v.*

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Cabazon Band of Mission Indians, 480 U.S. 202 (1987) ("*Cabazon*"), Congress enacted the Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497 (Oct. 17, 1988), 102 Stat. 2467, as amended, codified at 25 U.S.C. § 2701-2721 and 18 U.S.C. § 1166-1168 ("IGRA" or the "Act"). IGRA was principally intended to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and to provide a basis for state involvement in regulating Indian gaming to shield it from organized crime and corruption, to

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Roache, 54 F.3d 535 (9th Cir. 1995) (explaining the limits of a state's authority to enforce gaming laws within Indian lands), *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994) (holding that IGRA preempted California's efforts to tax off track betting on tribal lands); *U.S. v. E.C. Investments, Inc.*, 77 F.3d 327 (9th Cir. 1996) (holding that California's prohibition against the use of slot machines may serve as the predicate offense for federal prosecution of gambling activities in Indian country that are in violation of state law); *Chemehuevi Indian Tribe v. Wilson*, 987 F.Supp. 804 (N.D. Cal. 1997) (holding that federal government had a trust responsibility to sue California for violating a tribe's rights under IGRA); *U.S. v. Santa Ynez Band of Chumash Indians*, 33 F.Supp.2d 862 (C.D. Cal. 1998) (granting permanent injunction against nine California Indian tribes for continuing to conduct class III gaming without a tribal state class III gaming compact); *Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 21 Cal. 4th 585 (Cal.1999) (holding that Proposition 5 violated the California Constitution); *In re Indian Gaming Related Cases*, 331 F.3d 1094 (9th Cir. 2003), *cert. denied sub nom. Coyote Valley Band of Pomo Indians v. California*, ___ U.S. ___, 124 S.Ct. 1412, 158 L.Ed.2d 80 (2004) (holding that the State of California had not failed to negotiate a tribal-state gaming compact with the Coyote Valley Tribe in good faith); and *Flynt v. California Gambling Control Comm'n*, 104 Cal.App.4th 1125, 1129 (2002), *cert. denied*, ___ U.S. ___, 124 S.Ct. 398, 157 L.Ed.2d 278 (2003) (rejecting a challenge to Proposition 1A based upon the same claims that are litigated here).

prevent exploitation for non-Indian profit, and to ensure fair and honest gaming. 25 U.S.C. § 2702(1), (2).

IGRA divides Indian gaming into three categories, designated as class I, class II, and class III, each subject to a different level of regulation. 25 U.S.C. § 2710.[3] Class III gaming is defined by IGRA to include "all forms of gaming that are not class I gaming or class II gaming," 25 U.S.C. § 2703(8), and includes the most profitable forms of gaming, including slot machines, and banked and percentage card games. Because class III gaming can be "a source of substantial revenue for the Indian tribes and a significant rival for traditional private sector gaming facilities," its regulation "has been the most controversial part of the IGRA and the subject of considerable litigation between various Indian tribes and the states." *Flynt v. California Gambling Control Com.*, 104 Cal.App.4th 1125, 1134 (2002) (*"Flynt"*); *see also Hotel Employees & Restaurant Employees Int'l Union v. Davis*, 21 Cal.4th 585, 596 (1999) (*"Hotel Employees"*). These are also the forms of gaming most readily subject to corruption and about which states are "likely to have more serious and more legitimate public policy concerns." Kevin K. Washburn, *Recurring Problems in Indian Gaming*, 1 WYO. L. REV. 427, 429 (2001). Accordingly, it is only with respect to class III

[3] Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). The regulation of class I gaming is exclusively within the jurisdiction of the Indian tribes. 25 U.S.C. § 2710(a)(1). Class II gaming includes bingo and certain card games, but excludes banked card games, electronic games of chance, and slot machines. 25 U.S.C. §§ 2703(7)(A)(i), (ii), § 2703(7)(B). The regulation of class II gaming is also left within the jurisdiction of the tribes, but is subject to federal regulation as set forth in IGRA. 25 U.S.C. §§ 2710(a)(2), 2710(b)-(c).

gaming that tribes and the State must conclude a compact – the mechanism through which states may assert civil-regulatory jurisdiction over tribal gaming operations. 25 U.S.C. § 2710(d); *see also In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097-97 (9th Cir. 2003), *cert. denied sub nom. Coyote Valley Band of Pomo Indians v. California*, ___ U.S. ___, 124 S.Ct. 1412, 158 L.Ed.2d 80 (2004) (*"Coyote Valley"*).

IGRA makes class III gaming lawful on Indian lands only if such activities are: (1) authorized by an ordinance or resolution adopted by the governing body of the Indian tribe and the Chairman of the National Indian Gaming Commission; (2) located in a State that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the Indian tribe and the State and approved by the Secretary of the Interior. 25 U.S.C. §§ 2710(d)(1), 2710(3)(B).

The passage of IGRA marked the beginning of a new chapter of conflict over Indian gaming in California. A number of California tribes sought to negotiate compacts with the State that would permit the operation of class III games on their respective reservations, including banked and percentage card games and stand-alone electronic gaming machines (similar to slot machines). *Flynt,* 104 Cal.App.4th at 1136; *Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1255 (9th Cir. 1994), *amended by* 99 F.3d 321 (9th Cir. 1996) (*Rumsey*). Because these particular games were not permitted under California law, *see* Cal. Penal Code §§ 330, 330a, 330b, the State refused to conclude compacts that would authorize them. This refusal led to more litigation between the State and its Indian tribes. *Rumsey,* 64 F.3d at 1255; *see also Coyote*

Valley, supra, 331 F.3d at 1098-2001. In *Rumsey*, the Ninth Circuit Court of Appeals rejected the tribes' construction of IGRA and held that:

> IGRA does not require a state to negotiate over one form of Class III gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity "for any purpose by any person, organization, or entity," then it also must allow Indian tribes to engage in that same activity. 25 U.S.C. § 2710(d)(1)(B). In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.

Rumsey, 64 F.3d at 1258; *accord Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) ("The 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit.").

While the *Rumsey* decision explicitly held that the State had no obligation to negotiate with tribes over the most lucrative forms of class III gaming, it was silent on whether the State may nevertheless choose to do so. Rather than give up the ongoing class III gaming operations which many tribes had come to rely upon, the tribes sought to secure their class III gaming rights by proposing a statutory ballot initiative to the People of California, known as Proposition 5.

> The proposition, which amended state law but not the State constitution, required the state to enter into a model "Tribal-State Gaming Compact" with Indian tribes to allow certain class III gambling activities, such as banked card games

> and slot machines. Proposition 5 obligated the governor to execute compacts as a ministerial act within 30 days after any federally recognized Indian tribe requested such an arrangement. Under the plan, the compacts were deemed approved if the governor took no action within 30 days.

Flynt, supra, 104 Cal.App.4th at 1136 (internal citations omitted). *See generally* Cal. Gov. Code §§ 98000-98012; *Hotel Employees, supra*, 21 Cal.4th at 598-601 (summarizing the provisions of Proposition 5). Proposition 5 passed by a wide margin, demonstrating the electorate's support for tribal gaming. However, within days of its passage, a petition for a writ of mandate was filed in the California Supreme Court to prevent the Governor from implementing Proposition 5. *Hotel Employees,* 21 Cal.4th at 601. On August 23, 1999, the California Supreme Court ruled that the gaming rights conferred on the tribes by Proposition 5 violated article IV, section 19, subdivision (e), of the California Constitution.[4] *Id.* at 589. "Because Proposition 5, a purely statutory measure, did not amend section 19(e) or any other part of the Constitution, and because in a conflict between statutory and constitutional law the Constitution must prevail," Proposition 5 was struck down. *Id.*[5]

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[4] This provision, added to California's Constitution in 1984, provides that the "Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey." Cal. Const., art. IV, section 19, subd. (e).

[5] The California Supreme Court, however, severed and allowed to stand the final sentence of Cal. Gov. Code § 98005, containing the State's consent to federal suits brought by California tribes pursuant to IGRA. *Hotel Employees, supra*, 21 Cal.4th at 598-601 (rendering this

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During the pendency of the *Hotel Employees* case before the California Supreme Court, the newly-elected Davis Administration took office and sought to win the peace in tribal-state gaming relations by engaging tribes in compact negotiations afresh. Governor Davis was concerned about the effect an adverse decision in *Hotel Employees* could have on tribes dependent upon revenue from unlawful class III gaming operations. *Coyote Valley*, *supra*, 331 F.3d at 1101. In March 1999, formal negotiations commenced between the State and the tribes that would lead ultimately to this litigation. *Coyote Valley*, *supra*, 331 F.3d at 1101. A year later, on March 7, 2000, the voters of California adopted California Constitutional Amendment 11 of the 1999-2000 Regular Session (Resolution Chapter 142, Statutes of 1999) ("Proposition 1A"), which amended Article IV, section 19, subdivision (f) of the California Constitution to provide that:

> Notwithstanding . . . any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

Cal. Const., art. IV, § 19, subd. (f); Pet. App. 11a, 146a. Proposition 1A did not lift California's constitutional

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Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) inapplicable).

prohibition against casino-style gaming[6] on non-Indian lands, but did address IGRA's requirement that casino-style gaming be "permitted" by the State. So, while the operation of slot machines, and banking and percentage card games remain subject to criminal prosecution elsewhere within the State, on Indian lands they are expressly permitted, provided they are conducted in accordance with IGRA. Pet. App. 10a-11a, 147a; *see also Hotel Employees*, *supra*, 21 Cal.4th 585.

When Proposition 1A passed, the State of California had already enacted legislation ratifying more than sixty compacts that were negotiated by the Davis Administration, in anticipation of Proposition 1A's passage. *See Coyote Valley*, *supra*, 331 F.3d at 1107. On May 5, 2000, the Department of the Interior's Assistant Secretary of Indian Affairs approved these compacts, which became effective upon publication of the Interior Department's approval in the Federal Register. Pet. App. 11a. Notice of Approved Tribal-State Compacts, 65 Fed. Reg. 31,189 (May 16, 2000).

On February 7, 2001, the Petitioners, a coalition of non-tribal gambling interests, brought suit in the district court challenging the voter's adoption of Proposition 1A, the State's negotiation and ratification of the tribal-state compacts, the Interior Secretary's approval of the tribal-state compacts, and various state officers' enforcement of California's gaming laws. Pet. App. 12a, 13a. Petitioners

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[6] For ease of reference, unless otherwise indicated, the phrase "casino-style gaming" is used in this Opposition Brief to refer to those forms of class III games that are authorized by Proposition 1A.

alleged two separate bases for declaratory and injunctive relief: (1) that Proposition 1A and the tribal-state compacts violate IGRA, which authorizes tribes to conduct casino-style gaming "only if such activities are – located in a State that permits such gaming for any purpose by any person, organization, or entity;" and (2) that Proposition 1A and the tribal-state compacts violate the equal protection guarantees of the United States Constitution by creating an unlawful racial classification. Pet. App. 12a.

After hearing cross-motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, the district court held that Proposition 1A and the tribal-state compacts do not violate federal statutory or constitutional law, and so dismissed the Petitioners' claims brought under IGRA, the Equal Protection Clause, and the Due Process Clause. Pet. App. 141a. Judgment was entered on July 29, 2002. On December 22, 2003, following a timely appeal, the Ninth Circuit Court of Appeals affirmed the district court's ruling.

Before this Court, the Petitioners indicate that they intend to present the same arguments that have twice been properly rejected by the courts below. Proposition 1A and the tribal-state compacts do not violate IGRA, but, to the contrary, are fully compatible with the Act's plain language, purposes, and legislative history. They have been properly approved by the voters of California, by the political branches of the State's government, and by the Secretary of the Interior. Moreover, Proposition 1A and the tribal-state compacts are fully consistent with equal protection principles because they effect a political classification that is rationally related to legitimate governmental purposes – the furtherance of Congress' unique trust obligations to the tribes under an express delegation of

congressional authority to the State, the protection of Indian gaming within the State from criminal infiltration, and the protection of California's citizenry from the ill-effects of an historically disfavored industry. As the district court recognized, the Petitioners are aggrieved not by a violation of law but, if at all, by a legitimate social policy approved by the People; the proper forum for this challenge is not the courts, but the political branches of government:

> These matters of social policy are not ones for the court to resolve but are properly left for resolution by the political branches and the electorate. Where the political branches and the people of California have adopted a policy that does not violate either federal law or the United States Constitution, that policy is entitled to prevail.

Pet. App. 141a.

ARGUMENT

The petition should be denied. First, the gaming accord California has reached with its Indian tribes is unique because it arose in the context of a long, complicated, and contentious history of tribal-state relations involving gaming. And the notion advanced by the Petitioners that the exclusive right to conduct casino-style gaming established by Proposition 1A has somehow been duplicated by twenty-two other states of the Union is simply false. Accordingly, this case does not present a question of "great national importance." In addition, Petitioners' asserted circuit conflict is non-existent. Finally, the decisions reached by the district court and the court of appeals below are sound and so raise no legitimate

concern for this Court, either with respect to the future interpretation of IGRA, or the application of equal protection principles to Indian preferences.

A. This Case Presents No Issue of Great National Importance

The Petitioners contend that this case is one of "great national importance." Pet. 9. It is not. Apart from a series of arguments that merely restate the Petitioners' basic claim – that the courts below erred – the Petitioners' support for their contention that the case has national significance is limited to the misleading assertion that "there are tribal casinos in 30 states, only seven of which also allow non-Indian casinos." Pet. 6, 9-10, n.7. The intention of this claim, of course, is to suggest that California is the vanguard of a column of twenty-two other states that have authorized Indian tribes alone to conduct casino-style gaming. This is simply not true.

According to Alan Meister, Ph.D., the authority relied upon by the Petitioners, Pet. 10, n.7, only nineteen (19) states permit an Indian tribe or tribes to offer the casino-style gaming that is at issue in this case.[7] Of these nineteen

[7] These states are: Arizona, California, Colorado, Connecticut, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Washington, and Wisconsin. Alan Meister, Ph.D., *Indian Gaming Industry Report*, 10-14 (Casino City Press, July 2004). The *Indian Gaming Industry Report*, cited here, is the published and more comprehensive version of *The Economic Impact of Indian Gaming 2d Annual Report*, the report relied upon by the Petitioners. Although Florida also has tribal casinos, these are not operated under compact with the State and have been the subject of more than a decade of litigation. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

(Continued on following page)

(19) states, eight (8) have authorized non-tribal entities to operate large-scale, class III casinos,[8] and five other states have authorized non-tribal entities to conduct significant forms of class III gaming.[9]

The remaining five states are also distinguishable from California. Connecticut did not willingly assent to the establishment of large-scale tribal gaming in its state. However, because Connecticut permits class III gaming for charitable purposes, its tribes are, under the provisions of IGRA, entitled to conduct those same forms of class III gaming. *See Mashantucket Pequot Tribe v. Connecticut*, 737 F.Supp. 169 (D.Conn. 1990), *aff'd* 913 F.2d 1034; *see also* Conn.Gen.Stat.Ann. § 12-568f. The other four states, like California, authorize their own unique blend of non-tribal class III gaming.[10] Accordingly, the Petitioners' claim

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Tribal gaming that exists in Texas is not authorized by the State of Texas.

[8] These states are: Colorado, Iowa, Lousiana, Michigan, Mississippi, Nevada, North Carolina and South Dakota.

[9] These states are: Arizona, which allows the operation of video lottery terminals by non-tribal entities (Ariz. Rev. Stat. § 5,504, subd. (D); New Mexico, which allows the operation of slot machines at non-tribal horse racing tracks, commonly referred to as "racinos" (N.M. Stat. Ann. § 60-2E-27); New York, which allows the operation of video lottery terminals and charitable "casino nights" by non-tribal entities (N.Y. Tax Law § 1617-a, N.Y. Gen Mon. § 185); North Dakota, which allows non-profit organizations to offer the house-banked game, twenty-one (N.D. Cent. Code § 53-06.1-10); and Oregon, which allows the operation of video lottery terminals by non-tribal entities (Or. Rev. Stat. § 461.215). Significantly, video lottery terminals are not easily distinguishable from traditional slot machines. *See* Kurt Eggert, *Truth in Gaming: Toward Consumer Protection in the Gaming Industry*, 63 MD. L. REV. 217, 223, n.31 (2004).

[10] Kansas permits pari-mutual horse and dog racing, charitable bingo and a state lottery. KS Const. Art. 15, §§ 3a-3c. Minnesota permits pari-mutual horse racing, Minn. Stat. § 240.13(a), card clubs

(Continued on following page)

that their challenge to Proposition 1A is of "great national importance," based on the number of states that authorize casino-style gaming by tribes alone, is, at best, a gross exaggeration. Moreover, California's long and contentious history of tribal-state relations concerning gaming on Indian lands places Proposition 1A in a unique historical and political context that is not replicated elsewhere in the United States. For these reasons, and because the courts below have ruled correctly, this case presents no issues of "great national importance" that would support this Court's review.

B. The Alleged Circuit Split is an Illusory Basis for an Exercise of This Court's Jurisdiction

Another reason proposed by the Petitioners for granting the petition is that there is a purported conflict between the Ninth Circuit's decision in this case, and the Tenth Circuit's decision in *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green,* 995 F.2d 179, 180-81 (10th Cir. 1993) (*"Green"*) regarding the manner in which a

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with non-banked games at race tracks, Minn. Stat. § 240.30, charitable bingo, raffles, paddle wheels, tipboards, and pull-tabs, Minn. Stat. §§ 349.12, 349.13, 349.17 349.166, 349.172, 349.173, and a state lottery, Minn. Stat. § 609.761. Washington permits charitable bingo, card and dice games, Wash. Rev. Code §§ 9.46.0321, 9.46.0351, turkey shoots Wash. Rev. Code § 9.46.0331, golfing and bowling sweepstakes, Wash. Rev. Code §§ 9.46.0341, 9.46.0269(2), sports pools, Wash. Rev. Code § 9.46.0335, a state lottery, Wash. Rev. Code § 9.46.291, and pari-mutual wagering, Wash. Rev. Code § 67.16.060. Wisconsin permits pari-mutual wagering on, among other things, dog, horse and snowmobile races, Wis. Stat. §§ 562.05, 562.124, charitable bingo, Wis. Stat. § 563.11, and a state lottery, Wis. Stat. § 565.01.

state may "permit" class III gaming within the meaning IGRA. Pet. 7. No conflict exists.

In *Green*, the court held that the importation of video lottery terminals ("VLTs"), a form of class III gaming, onto the Tribe's land would violate the Johnson Act, 15 U.S.C. §§ 1171-1178, which prohibits the possession or use of "any gambling device" within Indian country. 15 U.S.C. § 1175. *Green*, *supra*, 995 F.2d at 180. IGRA provides a limited waiver of Johnson Act liability by providing that § 1175 "shall not apply to any gaming conducted under a Tribal-State compact that – (A) is entered into . . . by a State in which gambling devices are legal, and (B) is in effect." 25 U.S.C. § 2710(d)(6). However, the *Green* court concluded that because Oklahoma is not a state "in which gambling devices are legal," IGRA's exception to Johnson Act liability was not implicated. *Green*, *supra*, 995 F.2d at 181. The Petitioners here focus their attention on the *Green* court's rejection of the notion that a compact could itself render gaming devices legal within the meaning of IGRA.

> Finally, we reject as patent bootstrapping the Tribe's argument that the Compact itself legalizes VLTs for purposes of the IGRA's waiver provision. Congress must have meant that gambling devices be legal absent the Tribal-State compact; otherwise it would not have been necessary to require both that gambling devices be legal, 25 U.S.C. § 2710(d)(6)(A), and that the compact be "in effect," id. § 2710(d)(6)(B).

Green, *supra*, 995 F.2d at 181. But, in California, it is not tribal-state compacts but rather the amendment to the California constitution known as Proposition 1A that "permits" casino-style gaming, and the operation of slot machines, by federally recognized tribes. Recognizing this

distinction, the Ninth Circuit in this case expressly rejected the Petitioners' efforts to analogize the *Green* case. Pet. App. 16a-17a.

> However, Proposition 1A distinguishes the present controversy from the "bootstrapping" cases. Proposition 1A does more than authorize the Governor to enter into Tribal-State compacts. It explicitly states that "slot machines, lottery games, and banking and percentage card games *are hereby permitted* to be conducted and operated on tribal lands" subject to the regulations embodied in the Tribal-State compact. Proposition 1A (emphasis added). Thus, there is law – separate from the compact itself – that "permits such gaming" in certain circumstances. 25 U.S.C. § 2710(d)(1)(B).

Pet. App. 17a.

Accordingly, *Green* presents no conflict with the Ninth Circuit's decision below because California permits tribal casino-style gaming as a matter of state constitutional law, not merely by compact.

C. Proposition 1A Does Not Violate IGRA

California has resolved more than a decade of contention by accommodating tribal casino-style gaming conducted in compliance with federal law. As two federal courts in this case and three California state courts in parallel state court litigation[11] have already determined,

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[11] *See Flynt v. California Gambling Control Comm'n*, 104 Cal.App.4th 1125, 1129 (2002), *cert. denied*, ___ U.S. ___, 124 S.Ct. 398, 157 L.Ed.2d 278 (2003) (rejecting a challenge to Proposition 1A raising the same claims that are litigated here).

Proposition 1A comports with IGRA's plain language, advances IGRA's purposes, is consistent with IGRA's legislative history, and is supported by the canon of construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions to be interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); Pet. App. 57a, 132a.

1. IGRA's Plain Language Does Not Prohibit Proposition 1A

IGRA allows tribal casino-style gaming only if "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). California permits casino-style gaming by Indian tribes on the following terms:

> Notwithstanding . . . any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

Cal. Const., art. IV, § 19, subd. (f); Pet. App. 146a. The last sentence of Proposition 1A is clearly intended to address the "any purpose" language of § 2710(d)(1)(B) – California permits Indian tribes to operate casino-style gaming for the purpose of meeting the requirements of IGRA. The courts below understood the effect of Proposition 1A under IGRA:

> A state's affirmative permission to tribes to engage in gaming within the structure of IGRA may not have been on the forefront of what Congress had in mind in enacting IGRA and § 2710(d)(1)(B). But it is a kind of permission that is not foreclosed by the language of IGRA, and fits well within its plain language. In enacting IGRA, Congress employed capacious language to clarify the situations in which it would be lawful for Indian tribes to offer class III gaming.

Pet. App. 118a; *see also* Pet. App. 17a.

The plain text of the Act does not support the Petitioners' reading of the "any person, organization, or entity" requirement. IGRA does not require a state to permit gaming activities for any *non-Indian* purpose for any *non-Indian* person, organization, or entity. Pet. App. 121a. Moreover, Congress' use of the word "any" in § 2710(d)(1)(B) may only be understood, in context, to mean "one." Petitioners' view that "any" must mean "every" would lead to an absurd result. As the district court observed:

> If IGRA required that a tribe could only enter a compact if located in a state that permitted such activities for every purpose by every person, organization, or entity, no tribe would be allowed to enter into a class III gaming compact because all states impose at least some limits on who can offer gaming and for what purpose.

Pet. App. 121a. Proposition 1A thus comports with IGRA's plain text.

2. All Sources of Interpretive Guidance Indicate that IGRA Does Not Prohibit Proposition 1A

The plain text of IGRA obviates any need to refer to legislative history, or to canons of statutory construction. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (stating that when the words of a statute are unambiguous, the judicial inquiry is complete). Nevertheless, the courts below have both found it appropriate to consider their impact on Proposition 1A. The legislative history establishes that Congress had three principle objectives concerning the relationship between the tribes and the states: to provide states with regulatory authority over class III gaming; to permit states and tribes considerable flexibility in negotiating the terms of compacts; and to ensure that states would not discriminate against tribes by barring them from conducting games available elsewhere within the state. Pet. App. 123a. As the district court recognized, Proposition 1A:

> whether one agrees with it or not, does not conflict with IGRA's goal of maintaining state authority while protecting Indian gaming from discrimination. By contrast, to interpret IGRA to require the states to choose between no class III gaming anywhere and class III gaming everywhere would not further any of IGRA's goals and would limit the states' authority and flexibility without any resulting benefit to the tribes.

Pet. App. 128-129a.

Moreover, deference is owed to the Secretary of the Interior's approval of the compacts. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). The Secretary is responsible for approving

tribal-state gaming compacts and has authority to disapprove a compact that violates any provision of IGRA. 25 U.S.C. § 2710(d)(8)(B). Here, the Secretary's approval of the tribal-state class III gaming compacts negotiated by the State pursuant to Proposition 1A is entitled to considerable deference. The Secretary's approval, which impliedly approves of Proposition 1A, is consistent with the statutes's plain language, legislative history, and the balance of state and tribal sovereign interests advanced by IGRA. Pet. App. 130a.

Finally, to the extent that any ambiguity remains, the Indian canon of statutory construction was appropriately applied by the courts below, which construed the provisions of IGRA liberally in favor of California's Indian tribes to preserve their exclusive right to conduct casino-style gaming on Indian lands in California, in compliance with IGRA. Pet. App. 32a-36a, 132a; *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985).

D. Proposition 1A Does Not Violate Equal Protection Principles

Proposition 1A effects a political classification that is rationally related to legitimate governmental interests and so does not violate equal protection principles.[12] The

[12] The Equal Protection Clause provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1. For purposes of clarity, references to "equal protection" or the "Equal Protection Clause" encompass both Appellants' claim against the Federal Defendants under the Due Process Clause of the Fifth Amendment as well as Appellants' Fourteenth Amendment claim against the State Appellees. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 201 (1995) (noting the "congruence" principle: " 'Equal protection analysis in the Fifth Amendment

(Continued on following page)

Petitioners' contention that Proposition 1A constitutes invidious racial discrimination subject to strict scrutiny is unsupported by this Court's precedents and was appropriately rejected by the courts below.

It is well established that "every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians." *Morton v. Mancari*, 417 U.S. 535, 552 (1974) ("*Mancari*"). This Court has recognized that such special treatment might sometimes be constitutionally offensive in another context. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500 (1979) ("*Yakima Nation*"). Nevertheless, federal legislation enacted in furtherance of Congress' trust responsibility to Indian tribes is consistently upheld by the Court against equal protection challenges, provided the legislation is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, *supra*, 417 U.S. at 555.

IGRA reflects an exercise of Congress' trust responsibility over Indian tribes to promote economic development and self-government by establishing a framework for tribes to conduct class III gaming on Indian lands. 25 U.S.C. §§ 2701, 2702. Congress delegated to states, through the compact process, the authority and responsibility to resolve the state and local jurisdictional concerns

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area is the same as that under the Fourteenth Amendment.' ") (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).

that Congress understood would arise respecting class III gaming.[13]

Although discussions of Indian preferences generally arise in the context of federal statutes relating to Indian tribes, in *Yakima Nation* this Court bridged the analytical gap between the federal government's guardianship responsibilities toward Indian tribes, and a state law enacted in furtherance of federal objectives, that involved the adjustment of federal, state, and tribal jurisdiction. *Yakima Nation*, *supra*, 439 U.S. at 465-66. The Yakima Tribe brought an equal protection challenge to the State of Washington's implementation of Public Law 280, in which Congress granted to Washington, among other states, authority to assume civil and criminal jurisdiction over Indian country. *Id.* In 1963, the state assumed, by statute, "civil and criminal jurisdiction over Indians and Indian territory . . . within this state in accordance with the consent of the United States given by [Public Law 280]"

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[13] The Senate Select Committee on Indian Affairs' Report on IGRA provides the most authoritative discussion of Congress' legislative intent. It provides the following discussion of the compact process:

> After lengthy hearings, negotiations, and discussions, the [Select Committee on Indian Affairs] concluded that the use of compacts between tribes and states is the best mechanism with respect to the regulation of complex gaming enterprises such as.... casino gaming.... The Committee notes the strong concerns of states that state laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns.

S.Rep. No. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3074. *See* discussion on pages 1-3, *supra*.

over eight subject matter areas only.[14] *Yakima Nation*, *supra*, 439 U.S. at 466, n.1 (quoting Wash. Rev. Code § 37.12.010 (1976)). The Washington statute provided that the state would assume general civil and criminal jurisdiction over Indians and Indian territory, but only upon request of the affected Indian tribe. *Yakima Nation*, *supra*, 439 U.S. at 465. The Yakima Tribe never made any such request. The Tribe contended that Public Law 280 did not authorize a state to assume only partial jurisdiction within an Indian reservation, and that by doing so the state created a "checkerboard" jurisdictional scheme that violated equal protection principles. *Id.* at 499-500.

This Court sustained Washington's implementation of Public Law 280, applying rational basis review:

> It is settled that "the unique legal status of Indian tribes under federal law" permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub. L. 280. And many of the classifications made by Chapter 36 are also made by Pub. L. 280. . . . For these reasons, we find the argument

[14] These subject matter areas were: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and the operation of motor vehicles. *Yakima III*, *supra*, 439 U.S. 466, n.1.

> that such classifications are "suspect" an untenable one. . . . In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power.

Id. at 500-01 (citations omitted).

In this case, the courts below followed the *Yakima Nation* decision and determined that Proposition 1A must be subjected to the rational basis test. Pet. App. 41a, 139a-140a. According to the Ninth Circuit:

> Turning next to Proposition 1A, we must apply *Yakima [Nation].* Proposition 1A was enacted in response to IGRA, a federal law explicitly designed to readjust the regulatory authority of various sovereigns over class III gaming on the lands of federally recognized Indian tribes. The classifications in Proposition 1A echo those made in IGRA. In ratifying Proposition 1A, the people of California were legislating with reference to the authority that Congress had granted to the State of California in IGRA. Accordingly, rational-basis review applies to Proposition 1A as well.

Pet. App. 44a. And, of course, Proposition 1A passes the rationale basis test. Pet. App. 46a, 141a. The Ninth Circuit concluded that:

> Congress acted rationally in balancing the sovereign interests of tribes and states. The State of California, which historically had banned casino gambling altogether, acted rationally in limiting the placement and concentration of class III gaming operations to Indian lands and in recognizing the sovereign interest of federally recognized Indian tribes to choose a different path on Indian

lands. Accordingly, we find no violation of equal protection.

Pet. App. 56a-57a. Proposition 1A effects a political classification that is rationally related to legitimate governmental interests and has been properly upheld below.

CONCLUSION

For the reasons stated, the Court is requested to deny the petition for writ of certiorari.

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